Supreme Court, U.S
FILED

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No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

ANTONIO REED,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a prior inconsistent statement is sufficient evidence to support a conviction when the statement giver has no recollection of the events in question and therefore cannot be cross-examined effectively about the contents of the statement?

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PETITION FOR A WRIT OF CERTIORARI

Antonio Reed respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

The opinion of the court of appeals denying Petitioner's motion for rehearing en banc (App., *infra*, 15a to 16a) is unreported. The opinion of the Court of Appeals (App., *infra*, 1a to 11a) is unreported. The judgment of the trial court (App., *infra*, 12a to 14a) is unreported.

JURISDICTION

The United States Court of Appeals for the District of Columbia denied Petitioner's appeal on August 5, 2010, and on October 6, 2010, the Court of Appeals denied his motion for rehearing en banc. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a) and (b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are:

U.S. Constitution: Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a

speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Constitution: Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The District of Columbia statute that is the subject of this petition is:

D.C. Code § 14-102(b):

> A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (1) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (2) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive, or (3) an identification of a person made after perceiving the person. Such prior statements are substantive evidence.

STATEMENT

Petitioner seeks review of the decision of the Court of Appeals for the District of Columbia affirming the trial court's denial of his motion for acquittal on first degree murder and assault with intent to kill charges due to insufficiency of the evidence. Review by this Court is necessary to give much-needed attention to an issue of exceptional importance: whether prior inconsistent statements concerning the element of intent to commit first

degree murder can, standing alone, satisfy the government's burden of proving guilt beyond a reasonable doubt. In finding in the affirmative, the court of appeals ignored this Court's decision that there is a difference between that which the Constitution requires for the admission of such statements and that which is needed to establish their sufficiency. *See California v. Green*, 399 U.S. 149 (1970).

Here, Petitioner was convicted of first degree murder and assault with intent to kill. The government proved Petitioner's supposed intent by relying upon a statement that his ex-girlfriend gave to police in which she stated that Petitioner came to her house after the crime was committed and told her about the crime. Specifically, she testified that Petitioner came to her window one night and woke her up. He told her that he had been in a fight at a gas station and that a person had been shot and killed. (02/06/07 Tr. at 256.) When asked if Petitioner had told her how the person had been shot or who shot the person, she stated that she did not remember. (02/06/07 Tr. at 256.) The government then read portions of her July 28, 2005, grand jury testimony to the jury and used that grand jury testimony as its primary substantive evidence. The portions read included a partial transcript of a statement she had given the police on July 14, 2005, that she adopted in the grand jury proceeding, including her statement to the police that:

> [t]he night of the murder, my baby father came to my house, I guess after

> it happened, and he told me that him and his friend, Red just shot somebody at a gas station. And I asked him for what? And he told me because he had a beef with the boy and that someone told him that the boy was going to get him back. So before the boy could get him, he took it into his own hands and then shot him at the gas station. He told me that they had – that they beat him up, they beat him up first, then that's when his friend handed him a gun and he shot him and he handed the gun back and he ran off.

(02/06/07 Tr. at 260-261.)

The government asked her if that was the only conversation she had with Petitioner about the shooting. She stated, "That I recall, yes." (02/06/07 Tr. at 262.) The government then read portions of her grand jury testimony regarding an evening in May 2005 when she was watching the local news and saw a story about the shooting at the gas station in which the news broadcast showed a picture of a blue hat left at the scene. (02/06/07 Tr. at 263-65.) She told the grand jury that Petitioner called her later that evening to ask if she had seen the news. (02/06/07 Tr. at 265.) She claimed that she told him she had seen it and that he stated that the hat the police found on the scene was his. (02/06/07 Tr. at 265.)

On cross-examination, the witness again stated that she could not remember what Petitioner told her the night he visited her. (02/06/07 Tr. at 268-269.) She also stated that in July 2005, the same month she talked to the police and testified before the grand jury, she knew that Petitioner was dating another woman and that he was not going to ask the witness to marry him. (02/06/07 Tr. at 271.)

The witness' statement to the police, her grand jury testimony, and even her trial testimony, because she claimed she could not remember the events, were never subjected to cross-examination. On appeal, Petitioner argued that the prior inconsistent statement of a witness who no longer has a memory of the events related to the statement is insufficient evidence to sustain a conviction. The government countered that under *Bell v. United States*, 790 A.2d 523 (D.C. 2002), "there is nothing ... that precludes a trier of fact from basing a verdict, primarily or entirely, on a prior inconsistent statement made under oath and admitted under [D.C. Code §] 14-102(b)(1), and disregarding contrary live testimony from the very same person who made the statement." The court of appeals also cited *Bell* in its denial of Petitioner's appeal. (App., *infra*, 8a.) However, neither the government nor the court of appeals focused on the issue which is before this Court: whether it is sufficient to base a conviction on an out of court statement made by a witness who no longer remembers the incident and therefore cannot be effectively cross-examined about it?

Petitioner properly raised this issue at trial when he moved for a judgment of acquittal based on insufficiency of the evidence (App., *infra*, 17a-18a.) The trial court denied his motion. The issue was the subject of Petitioner's appeal to the District of Columbia Court of Appeals, which issued a written opinion denying Petitioner's motion. (App., *infra*, 1a-11a.) Petitioner moved for a rehearing en banc and was denied. (App., *infra*, 15a-16a.)

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IMPROPERLY EXPANDS THE SCOPE OF THE RULE REGARDING ADMISSIBILITY OF PRIOR INCONSISTENT STATEMENTS

In 1975, the Federal Rules of Evidence were revised to permit the use of prior inconsistent statements as substantive evidence. Fed. R. Ev. 801(d)(1). In 1995, the Council of the District of Columbia rewrote D.C. Code § 14-102(b) to also permit the use of prior inconsistent statements as substantive evidence. *Johnson v. United States*, 820 A.2d 551, 557 n.3 (D.C. 2003). When the Federal Rules of Evidence were revised, legal scholars were quick to observe that prior inconsistent statements used as evidence, while admissible, would likely be insufficient to support a conviction alone. The Senate Committee Report on the proposed rule stated:

> it would appear that some of the opposition to this Rule is based on a

> concern that a person could be convicted solely upon evidence admissible under this Rule. The Rule, however, is not addressed to the question of the sufficiency of evidence to send a case to the jury, but merely as to its admissibility. Factual circumstances could well arise where, if this were the sole evidence, dismissal would be appropriate.

S.Rep. No. 1277, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin.News 7051, 7063 n. 21 (483-84). Likewise, in his treatise on the federal rules, Judge Weinstein observed that:

> theoretically, a party may be able to make out a prima facie case even if the only evidence is a previous inconsistent statement of this type. . . . In a criminal prosecution, however, it is unlikely that a prior inconsistent statement alone will suffice to support a conviction. . . .

4 J. Weinstein & M. Berger, Weinstein's Evidence P 801 (d)(1)(A)[01], at 141-42 (1995) (footnotes and quotation marks omitted).

While a prior inconsistent statement may be admissible as substantive evidence, the central difficulty in basing a conviction entirely on an out-of-court statement that is inconsistent with in-court testimony is that the fact finder may be falsely

persuaded by the presentation of the out-of-court statement. This inherent danger is compounded when that prior inconsistent statement is the only evidence of one of the elements of the charges against the accused and becomes the sole basis for conviction. *See* Stanley Goldman, *Guilt by Intuition: The Insufficiency of Prior Inconsistent Statements to Convict*, 65 N.C.L. REV. 1, 2 (1986). Further, the jury may draw negative inferences from the recanting witness' demeanor, failing to recognize that his or her demeanor may have been just as poor when the statements were first made. *Id.* Thus, "the witness' unsatisfactory trial demeanor . . . may create an illusion of unwarranted reliability associated with the earlier statement." *Id.* at 22. *See State v. Pierce*, 906 S.W.2d 729, 735 (Ct. App. Miss. 1995).

The decision below is mistaken in several fundamental respects. First, the panel's determination that prior inconsistent statements, standing alone, are sufficient to prove guilt beyond a reasonable doubt improperly expands the scope of D.C. Code § 14-102(b). The statute addresses the *admissibility* of prior inconsistent statements as substantive evidence. The court of appeals' determination expands the scope of the statute by finding that such statements are *sufficient* on their own to provide a basis for conviction. The panel also failed to address several important issues regarding the use of prior inconsistent statements at Petitioner's trial. While the court of appeals found that there was evidence corroborating the inconsistent witness testimony, it failed to discuss

how the corroborating evidence demonstrated that Petitioner had the necessary intent to commit first degree murder. Indeed, the corroborating evidence failed to establish the element of intent. The prior inconsistent statements were the sole evidence of Petitioner's intent to commit first degree murder.

Further, the court of appeals determination that it can base a verdict primarily or entirely on a prior inconsistent statement improperly expands the scope of the statute by finding that such prior inconsistent statements are *sufficient* to provide the sole basis for a conviction, without any meaningful analysis of corroboration or reliability.

II. THE DECISION BELOW CONFLICTS WITH RULINGS OF THIS COURT, THE SIXTH CIRCUIT AND THE HIGHEST COURTS OF SEVERAL STATES

A. The Decision Conflicts With Principles Established By This Court In *California v. Green*

In *California v. Green*, 399 U.S. 149, 164 (1970), this Court held that admitting a declarant's out-of-court statements, as long as the declarant was testifying as a witness and was subject to cross-examination, did not violate the Sixth Amendment. In doing so, it cited *Mattox v. United States*, 156 U.S. 237, 242-243 (1895) for the general principle behind the Confrontation Clause:

> The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

399 U.S. at 157-158. The Court held that there was no Confrontation Clause violation as long as "the declarant is testifying as a witness and subject to full and effective cross-examination." *Id.* at 158. It stressed the importance of confrontation by cross-examination in such circumstances, because it "permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." *Id.* When the declarant was unavailable to testify, the Confrontation Clause was violated, as this Court noted in *Douglas v. Alabama*, 380 U.S. 415 (1965). There the Court reversed a conviction in which the prosecution read into the record an alleged confession of the defendant's supposed accomplice who refused to testify on self-incrimination grounds. The

confrontation problem arose precisely because the supposed accomplice could not be cross-examined as to his prior statement. 380 U.S. at 419-420.

Similarly, when a declarant cannot remember anything about the prior statement, effective cross-examination is impossible. The instant situation is in many ways analogous to *Douglas* in that the jury could not judge whether the declarant, here Petitioner's ex-girlfriend, was telling the truth when she gave her statement by judging her demeanor as she described or explained away the differences in her previous testimony. Instead, she did not say anything about the events at all because she could not remember them. Allowing the prior statement in such circumstances impermissibly expands the Court's ruling in *California v. Green*. However, even if such statements are admissible, they should not, standing alone, be sufficient evidence to sustain a conviction, as discussed next.

B. The Decision Below Creates A Direct Conflict With Decisions Of Other Courts

The decision of the District of Columbia Court of Appeals conflicts with the U.S. Court of Appeals for the Sixth Circuit, which has held that where prior inconsistent statements are the

> only source of support for the central allegations of the charge, especially when the statements barely, if at all, meet the minimal requirements of

> admissibility, we do not believe that a substantial factual basis as to each element of the crime providing support for a conclusion of guilt beyond reasonable doubt has been offered by the Government.

United States v. Orrico, 599 F.2d 113, 118 (6th Cir. 1979). In *Orrico*, the Sixth Circuit evaluated whether the government had presented sufficient evidence to sustain a conviction for check fraud. The only evidence that the accused had committed the crime was a written statement by a bank employee that was signed approximately one year after the alleged crime took place, and some conflicting testimony by another witness who also did not have a complete memory of the events. *Id.* at 115-116. At trial, the bank employee could no longer remember what had occurred, so the government relied upon her written statement as a past recollection recorded. *Id.*

The court recognized the prejudice to the appellant in attempting to cross-examine a declarant who professed no memory of the event:

> Under these circumstances, while Orrico may have been physically confronted with the witnesses against him, cross-examination was, for all practical purposes, impossible. He could not probe Kennedy's memory of the meeting at Bosse's office; she did not remember it at all. He could not

> challenge her identification of him as the person who authorized her over the phone to endorse the check; she could not remember if she could recognize his voice.

Id. at 117. The Court noted that its

> concern in this case focuses on the fact that the central element of the crime with which the defendant was charged was established entirely through the use of out-of-court statements, made at a time when the defendant had no opportunity to cross-examine the witnesses as to the accuracy of their accusations.

Id.

Turning to the sufficiency of the evidence in *Orrico*, the Sixth Circuit stated that while it had a "general hesitancy" to disturb a jury verdict, "there must be substantial evidence as to each element of the offense from which a jury could find that the accused is guilty beyond a reasonable doubt." It cited a previous Sixth Circuit opinion, *United States v. Green*, as defining "substantial evidence" as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept to support a conclusion. It is evidence affording a substantial basis of fact from which the fact in issue can be reasonably inferred." *Id.* at 117 (citing *Green*, 548 F.2d 1261, 1266 (6th Cir. 1977). Because the

prior inconsistent statements in *Orrico* constituted the "sole evidence of a central element of the crime charged," the Sixth Circuit held that the government failed to sustain its burden of proving guilt beyond a reasonable doubt. *Id.* at 118.

Other courts have come to the same conclusion. In *State v. Moore*, the Florida Supreme Court noted that "the risk of convicting an innocent accused is simply too great when the conviction is based entirely on prior inconsistent statements." 485 So. 2d 1279, 1281 (Fla. 1986). *See also State v. Green*, 667 So. 2d 756 (Fla. 1995); *R.T.L. v. State of Florida*, 746 So. 2d 871 (Fla. Dist. Ct. App. 2000). Convictions were overturned in each case because the prior inconsistent statement was the sole evidence against the accused.

Likewise, in *Commonwealth v. Sineiro*, the Massachusetts Supreme Court acknowledged that "when the prior inconsistent grand jury testimony concerns an essential element of the crime, the Commonwealth must offer at least some additional evidence on that element in order to support a conclusion of guilt beyond a reasonable doubt." 740 N.E. 2d. 602, 607 (Mass. 2000). It also recognized that grand jury testimony especially requires a degree of corroboration:

> Grand jury testimony, while given under oath, is given in secret, may contain hearsay, is often done by way of leading questions, and is not subject to cross-examination. It is an

> understandable concern, therefore, that grand jury testimony admitted at trial for substantive use be subject to a certain level of corroboration before a conviction can be based on it.

Id. at 609. In doing so, it echoed the holding in *Orrico*.

Similarly, in *State v. Robar*, 157 Vt. 387, 601 A.2d 1376 (Vt. 199¹), the Vermont Supreme Court reversed a burglary conviction because it found that the prior statement was not sufficiently reliable to support conviction even though made under oath. The Alaska Supreme Court came to a similar conclusion in *Brower v. State*, 728 P.2d 645, 648 (Alaska 1986), in which it held that prior inconsistent grand jury testimony, which was inadequately corroborated, was insufficient evidence to sustain a conviction.

Here, the Court of Appeals distinguished *Orrico* by stating that there was physical evidence that corroborated the ex-girlfriend's statement. (App., *infra*, 7a-8a.) It stated:

> In this case, the government's evidence against [Petitioner] consisted of witness testimony that he initiated the fight and that he admitted shooting [the victim] because he believed "the boy was going to get him back" as a result of a beef; DNA from the baseball cap;

> surveillance video tape; and expert (ballistics) testimony.

Id. However, the only one of those pieces of evidence that demonstrated the supposed intent to kill was the statement made by the ex-girlfriend to the police, which she could no longer remember at trial and which is the subject of this petition. The Court of Appeals failed to address how the other evidence showed Petitioner's intent to commit murder. The DNA evidence merely places Petitioner at the scene, something that has never been disputed. The surveillance footage shows that there was an altercation between Petitioner, the victim, and an unknown man wearing camouflage clothing. Again, this evidence in no way establishes Petitioner's intent to commit murder. If anything, it shows that Petitioner was pushed away from the decedent by the actual killer, the man in camouflage. (Appellate App. P/Q 23:36:31-33.) Finally, the ballistic evidence simply establishes that the gun used to commit the murder was likely the same make and model as the silver gun that the man in camouflage was seen holding on the video surveillance footage. (02/07/07 Tr. at 399-401, 403, 407-11.) The ballistic evidence also establishes that a magazine fell out of a gun that was likely the same make and model as the black gun held by Petitioner – a gun that was not used to commit the murder. (02/07/07 Tr. at 399-401, 403, 407-11.) However, like the DNA and surveillance footage, the ballistic evidence in no way shows that Petitioner *intended* to commit murder. Thus, Petitioner respectfully submits that the panel's conclusion that the corroborating evidence

was sufficient for a jury to find that Petitioner was guilty of murder beyond a reasonable doubt is misplaced.

CONCLUSION

For the reasons stated, the Court should grant the petition.

Respectfully submitted,

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APPENDIX A

[Filed Aug. 5, 2010]
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 07-CF-531

ANTONIO D. REED, APPELLANT,

v. FEL4054-05

UNITED STATES, APPELLEE.

Appeal from the Superior Court of the District of Columbia Criminal Division

(Hon. Erik P. Christian, Trial Judge)

(Argued February 17, 2010 Decided August 5, 2010)

Before REID and KRAMER, *Associate Judges*, and SCHWELB, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: A jury convicted appellant, Antonio D. Reed, of premeditated first-degree murder while armed,[1] assault with intent to kill while armed ("AWIKA"),[2] and two counts of possession of a firearm during the commission of a

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[1] In violation of D.C. Code §§ 22-2101 and 22-4502.

[2] In violation of D.C. Code §§ 22-401 and 22-4502.

crime of violence ("PFCV").[3] Discerning no error, we affirm the judgment of the trial court.

FACTUAL SUMMARY

The government presented evidence showing the following events. At the Lowest Price gas station, in the Southeast quadrant of the District of Columbia, Alade Ganiyu was working in the cashier's booth. Mr. Ganiyu sold Dewayne James a cigar and soon after, Mr. Reed approached Mr. James. The two men began to fight and dragged each other onto the ground near the gas pumps. Mr. Ganiyu witnessed the altercation from inside his booth as he talked on the telephone. He then heard two gunshots and looked out of the booth's window to see Mr. James on the ground, and Mr. Reed and another man who was dressed in camouflage. Mr. Reed and the camouflaged man ran off in different directions.

Four security cameras at the gas station recorded the incident, but not the actual shooting. On the surveillance video Mr. Reed follows Mr. James to the cashier's booth and then a fight ensues. Mr. Reed is holding a black gun while he straddles Mr. James as the two men wrestle on the ground near the gas pumps. The camouflaged man walks toward Mr. Reed and Mr. James with a silver gun in his hand and seems to help Mr. Reed but Mr. Reed stumbles backward. There is an inexplicable eighteen-second camera malfunction and the next

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[3] In violation of D.C. Code §§ 22-4502, 4504(b).

image is of Mr. James lying motionless on the pavement.

After the shooting, Mr. Reed went to his then-girlfriend and soon-to-be mother of his child's house and knocked on the bedroom window. According to her (Leticia Bryant), Mr. Reed said he and his friend, Red, "just shot somebody at a gas station." She asked him for what and he told her, "because he had a beef with the boy and that someone told him that the boy was going to get him back. So before the boy could get him, he took it into his own hands and then shot him at the gas station." They first beat him up, then his friend, Red, handed him a gun and he shot him, then he handed the gun back, and ran away. Subsequently, footage from the gas station appeared on television. Soon after, Mr. Reed telephoned Ms. Bryant to ask whether she saw him on the news.

The police recovered two shell casings and a loaded magazine from the ground at the gas station, and two bullets from Mr. James' clothing. According to ballistics expert Jonathan Pope, the shell casings and the bullets were discharged from a .38 caliber semiautomatic pistol, although, he could not determine if the casings and bullets were discharged from the same gun. Mr. Pope also testified that the magazine was consistent with a .22 caliber Ruger semiautomatic pistol. On a Ruger pistol, a minimal amount of pressure on the magazine-release button dislodges the magazine and the gun will not fire. The police recovered from the scene a blue baseball cap containing DNA for which Mr. Reed "[could] not be excluded as a potential contributor."

ANALYSIS

Sufficiency of the Evidence

Mr. Reed contends that the government's evidence was insufficient to find him guilty beyond a reasonable doubt. Specifically, he argues that key witness testimony (Mr. Ganiyu's prior grand jury testimony and Ms. Bryant's prior police statement) was contradictory and uncorroborated; the surveillance video provided reasonable doubt; and the evidence did not show the requisite *mens rea*. We conclude that the evidence was sufficient to convict Mr. Reed of the charged crimes beyond a reasonable doubt.

> In reviewing a claim challenging the sufficiency of the evidence, we must 'view the evidence in the light most favorable to the government, giving deference to the fact finder's right to weigh the evidence, determine the credibility of the witnesses, and draw inferences from the evidence presented. We can only reverse a conviction on this ground if there is no evidence upon which a reasonable mind could infer guilt beyond a reasonable doubt.'

Mitchell v. United States, 985 A.2d 1125, 1133-34 (D.C. 2009); *McCullough v. United States*, 827 A.2d 48, 57 (D.C. 2003) (quoting *Patton v. United States*, 633 A.2d 800, 820 (D.C. 1993). When reviewing for sufficiency, there is "no distinction between direct and circumstantial evidence." *Busey v. United*

States, 747 A.2d 1153, 1160 (D.C. 2000) (citing *Curry v. United States*, 520 A.2d 255,263 (D.C. 1987).

In a prosecution for premeditated murder, the government must prove all of the elements of the offense, whether the defendant is charged as a principal or as an aider or abettor. *Wilson-Bey v. United States*, 903 A.2d 818, 822 (D.C. 2006). The elements for premeditated murder include: premeditation, deliberation, and intent to kill. *Id.* "To prove premeditation, the government must show that a defendant, before acting, gave thought to the idea of taking a human life and reached a definite decision to kill, while deliberation is proved by demonstrating that the accused acted with consideration and reflection upon the preconceived design to kill." *Fortson v. United States*, 979 A.2d 643, 656 (D.C. 2009) (quoting *McAdoo v. United States*, 515 A.2d 412,427 (D.C. 1986). "Both premeditation and deliberation may be inferred from the surrounding facts and circumstances, and may occur in only a few seconds." *Id.* (quoting *Downing v. United States*, 929 A.2d 848, 862 (D.C. 2007».

Here, Mr. Reed takes issue, not with the evidence itself, but with the inferences the jury chose to draw from it. His position however, ignores the fact that drawing reasonable inferences is within the province of the jury. *Mitchell, supra*, 985 A.2d at 1133-34. Although there was an unexplainable camera malfunction that did not directly show Mr. Reed shooting Mr. James, the jury could reasonably infer from the evidence presented that he fired one of the fatal shots with the requisite intent. Mr. Reed did not dispute that he is the man beating Mr.

James in the video. Based on the video footage, it is evident that Mr. Reed beat Mr. James and then a man in camouflage ran over to the fight with a silver gun in his hand. Eighteen seconds later, the video shows Mr. James lying still and alone in the lot. Moreover, after the shooting, Mr. Reed told Ms. Bryant that he and his friend "shot somebody at a gas station."

Based on this evidence, the jury could rationally infer that Mr. Reed "gave thought to the idea of taking [Mr. James'] life and reached a definite decision to kill," and that he thus "acted with consideration and reflection upon the preconceived design to kill." *Fortson v. United States*, 979 A.2d 643, 656 (D.C. 2009). In addition, "carrying a gun to the scene of the murder is 'highly probative of premeditation and deliberation' because it suggests that the defendant arrived on the scene with a preconceived plan to kill." *Busey*, 747 A.2d at 1161 (quoting *Frendak v. United States*, 408 A.2d 364, 371 (D.C. 1979)). The video footage depicted Mr. Reed holding a black gun while he fought with Mr. James. This footage suggests that Mr. Reed brought the gun to shoot Mr. James. The video footage also showed the camouflaged man carrying a silver gun, however, this does not refute the fact that Mr. James possessed the black gun prior to the camouflaged man's arrival and had a "preconceived plan to kill." *Busey*, 747 A.2d at 1161. Based on this evidence, "a reasonable mind could infer guilt beyond a reasonable doubt." *Mitchell*, 985 A.2d at 1134.

Mr. Reed's attack on prior out-of-court statements by Mr. Ganiyu and Ms. Bryant is unpersuasive. He argues that a prior statement by Mr. Ganiyu was inconsistent with his trial statement concerning the person he saw fleeing from the scene and the color of the gun that this person carried. Additionally, he contends that Ms. Bryant never adopted her police statement at trial and had an obvious motive to lie when she appeared before the grand jury, that is, she was a jilted ex-girlfriend who had just given birth to Mr. Reed's child and she knew that he was dating another woman. Of course, the jury had the right to assess the credibility of Mr. Ganiyu and Ms. Bryant and to weigh that evidence. *Mitchell, supra,* 985 A.2d at 1133-34.

Furthermore, although Mr. Reed recognizes that the prior out-of-court statements of Mr. Ganiyu and Ms. Bryant could be admitted properly under D.C. Code § 14-102(b)(1), he nevertheless asserts that "there is no corroboration for either [Ms.] Bryant's or [Mr.] Ganiyu's prior inconsistent statements, [and that he] should not have been convicted based solely on these statements." First, as previously discussed, the video corroborated Ms. Bryant's prior statement in several aspects. Second, Mr. Reed's reliance on the Sixth Circuit's *United States v. Orrico,* 599 F.2d 113 (6th Cir. 1979), is unavailing. That case is distinguishable from this one. *Orrico* involved a prosecution for an elaborate financial scheme to illegally "improve position on paper without actually investing any capital." *Id.* at 115. The only evidence linking the defendant to the crime consisted of "one sentence" in a statement drafted one year after the alleged crime and grand

jury testimony used for impeachment. *Id.* at 116. Reviewing for sufficiency, the court held that "when such evidence is the only source of support for the central allegations of the charge . . . we do not believe . . . a conclusion of guilt beyond reasonable doubt has been offered by the government." *Id.* at 118. In this case, the government's evidence against Mr. Reed consisted of witness testimony that he initiated the fight and that he admitted shooting Mr. James because he believed "the boy was going to get him back" as a result of a beef; DNA from the baseball cap; surveillance videotape; and expert (ballistics) testimony. Similar additional evidence was not presented in *Orrico.* Moreover, as the government points out, our decision in *Bell v. United States,* 790 A.2d 523 (D.C. 2002), specifically states that "there is nothing . . . that precludes a trier of fact from basing a verdict, primarily or entirely, on a prior inconsistent statement made under oath and admitted under [D.C. Code §] 14-102 (b)(l), and disregarding contrary live testimony from the very same person who made the statement." *Id.* at 530-31.

The Video Equipment Issue

Mr. Reed contends that he was "substantially prejudiced" after the jury retired for its deliberation and the trial court rejected his counsel's request "that the jury be given the equipment to review the [security camera] videos as soon as possible." The record does not indicate whether the trial judge advised the jury about obtaining the video equipment or whether Mr. Reed's counsel followed up on the issue. What the record does reflect is that

the judge, on two separate occasions prior to Mr. Reed's request, instructed the jury that they could send him a note via the clerk if they needed to communicate with him about any matter. Mr. Reed's request occurred after the jury had been excused for deliberation and the record does not indicate whether they were actually given the instruction. Additionally, the jury was excused for deliberation at 2:47 p.m. on Thursday, February 8th, 2007 and they had reached a verdict by 2:35 p.m. Friday, February 9th, 2007. Mr. Reed now asserts that there was prejudice, and hence reversible error, because the Court did not explicitly give the jury unfettered access to the video equipment and/or failed to advise that the equipment be available upon request.

This Court will not reverse if it is able to "say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *Edwards v. United States,* 785 A.2d 292,294 (D.C. 2001) (quoting *Dallago v. United States,* 427 F.2d 546, 560 (D.C. Cir. 1969) (quoting *Kotteakos v. United States,* 328 U.S. 750, 765 (1946)). When an appellant fails to raise an issue in the trial court, he must meet the plain error standard on appeal. In other words, "[u]nder the plain error standard, the error must be (1) 'obvious or readily apparent,' and 'clear under current law'; and (2) 'so clearly prejudicial to substantial rights as to jeopardize the very fairness and integrity of the trial.'" *Coates v. United States,* 705 A.2d 1100, 1104 (D.C. 1998) (quoting *Hasty v. United States,* 669 A.2d 127, 134 (D.C. 1995))

(citations omitted); *see United States v. Olano*, 507 U.S. 725, 732 (1993).

Mr. Reed's argument fails to show any trial court error or abuse of discretion. The trial judge's decision not to keep the video equipment in the jury room was "rational and informed" and "within the range of permissible alternatives." *Johnson v. United States*, 398 A.2d 354,365 (D.C. 1979). Given the very large number of trial court judges and magistrate judges who must share video equipment between multiple court rooms, the decision not to send the equipment to the deliberation room until the need arose contributed to the efficiency of the trial court. Even assuming *arguendo* that the trial court erred or abused its discretion, we are satisfied that Mr. Reed would not be able to demonstrate that the error or abuse of discretion seriously affected his substantial rights, or "seriously affected the fairness, integrity or public reputation of the proceedings" against him. *Williams v. United States*, 858 A.2d 984, 998 (D.C. 2004). The jury saw the entire video at least two different times and Mr. Reed's counsel played certain portions of the video repeatedly for the jury. If the jurors wanted to see the video they could have sent a note to the judge via the clerk.

Accordingly, for the foregoing reasons, we affirm the trial court's decision.

So *ordered*.
ENTERED BY DIRECTION OF
THE COURT:

/s/ Joy A. Chapper

JOY CHAPPER
Acting Clerk of the Court

Copies to:

Han. Erik P. Christian

Eric L. Yaffe, Esq.
2600 Virginia Avenue, N.W., #1111
Washington, D.C. 20037

Elizabeth Trosman, Esq.
Assistant U.S. Attorney

APPENDIX B

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

United States of America v.	JUDGMENT IN A CRIMINAL CASE
	Case Number: 2005 EEL 4054
ANTONIO DUPRE REED	PDID No. 465-943

THE DEFENDANT:
☐ ENTERED A PLEA OF GUILTY TO COUNT(S)_____
☒ WAS FOUND GUILTY ON COUNT(S) 1, 2, 3 and 4_____
AFTER A PLEA OF NOT GUILTY.

Count	Nature of Charges	Title & Section	Date of Offense
Count 1	Murder 1 While Armed	22 DC 2101.4502	05/02/05
Count 2	Assault With Intent to Kill While Armed	22 DC 401-4502	05/02/05

Count 3	Possession of Firearm During Crime of Violence	22 DC 4504 (b)	05/02/05
Count 4	Possession of Firearm During Crime of Violence	22 DC 4504 (b)	05/02/05

SENTENCE OF THE COURT

As to count "1" (600) six hundred months followed by (5) five years of supervised release.
As to count "2" (180) one hundred and eighty months followed by (5) five years of supervised release to run concurrent count "1" As to count "3" (72) severity two months followed by (3) three years of supervised release to run consecutive to count "1" As to count "4" (72) seventy two months followed by (3) three years of supervised release to consecutive to count "2"

APPEAL RIGHTS GIVEN

☒ The defendant is hereby committed to the custody of the Attorney General to be imprisoned for a total term of 744 months
☐ MANDATORY MINIMUM term of _____ _____ applies.

☒ Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years

☐ The Court makes the following recommendations to the Bureau of Prisons:

Costs in the aggregate amount of $400.00 have been assessed under the Victims of Violent Crime Compensation Act of 1996, and ☐ have ☒ have not been paid.

April 27, 2007
Date

/s/ Erik P. Christian
Judge

Erik P. Christian, Associate Judge
Name and Title of Judicial Officer

Certification by Clerk pursuant to Criminal Rule 32(d).

April 27, 2007
Date

Sandra Bennett-Cave
Deputy Clerk

HUNTERB 04/27/2007 5:20:24 PM

APPENDIX C

[Filed Oct. 6, 2010]

District of Columbia
Court of Appeals

No. 07-CF-531

ANTONIO REED,

Appellant,

FEL4054-05

v.

UNITED STATES,

Appellee.

BEFORE: Washington, Chief Judge; Ruiz, Reid, Glickman, Kramer, *Fisher, Blackburne-Rigsby, Thompson, and Oberly, Associate Judges.

ORDER

On consideration of appellant's petition for rehearing en bane; and it appearing that no judge of this court has called for a vote on the petition for rehearing en bane, it is

ORDERED that the petition for rehearing en bane is denied.

PER CURIAM

* Judge Fisher is recused from this case.

Copies to:

Honorable Erik P. Christian

Eric L. Yaffe, Esquire
Gray, Plant, Mooty, Mooty & Bennett, P.A.
2600 Virginia Avenue, NW
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Elizabeth Trosman, Esquire
Assistant United States Attorney

sl

APPENDIX D

[Filed Feb. 9, 2007]

In The

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

Criminal Division

UNITED STATES OF AMERICA

2005 Fel 4054

vs.

In-Trial: 2/9/07

J. Erik Christian

ANTONIO DUPRE REED

DEFENDANT' MOTION FOR JUDGMENT OF ACQUITTAL

COMES NOW Antonio Dupree Reed by and through undersigned counsel respectfully to move this Honorable Court for a judgment of acquittal on each and every charged offense. In support of this motion, counsel submits the following:

1. The record.

Mr. Reed requests a hearing.

Respectfully submitted,

s/ Sara Kopecki

Sara E. Kopecki #436304
619 Morris Place, N.E.
Washington, D.C. 20002
202-543-2113
Attorney for Mr. Reed

Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing was sent by facsimile (202-305-1577) to Assistant U.S. Attorney Michelle Jackson of the U.S. Attorney's Office, 555 Fourth Street, N.W., Washington, D.C. 20530 this 8th day of February, 2007.

/s/ Sara E. Kopecki